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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF THE  
STATE OF CALIFORNIA, ET AL.,

Appellees.

On Appeal From the Supreme Court  
of California

BRIEF OF AMICUS CURIAE THE LEGAL AID SOCIETY  
OF NEW YORK CITY IN SUPPORT OF APPELLEES

KALMAN FINKEL  
Attorney-in-Charge  
The Legal Aid Society  
of New York City  
Civil Division  
11 Park Place  
New York, N.Y. 10007  
(212) 227-2755

HELAINE BARNETT  
Assistant Attorney-in-Charge  
The Legal Aid Society  
Civil Division  
[Counsel of Record]  
11 Park Place  
New York, N.Y. 10007  
(212) 227-2755

RICHARD BRIFFAULT  
Associate Professor  
of Law  
Columbia University  
School of Law  
435 West 116 Street  
New York, N.Y. 10027  
(212) 280-2638

JOHN E. KIRKLIN  
Director of Litigation  
HELEN HERSHKOFF,  
of Counsel  
The Legal Aid Society  
Civil Appeals & Law  
Reform Unit  
11 Park Place  
New York, N.Y. 10007  
(212) 406-0745

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### INTEREST OF AMICUS CURIAE

The Legal Aid Society of New York City is a private non-profit organization incorporated under the laws of the State of New York for the purpose of rendering free legal representation and assistance to persons in New York City who are without adequate means to employ other counsel. It has been cited by this Court as perhaps "the oldest formally organized legal aid society in the United States," and as enjoying a "wide reputation for the devotion of its staff and the quality of its service." Blum v. Stenson, \_\_\_ U.S. \_\_\_, 104 S.Ct. 1541, 1544 n.3 (1984).

The Civil Division of The Legal Aid Society has appeared before this Court on numerous occasions representing parties or as amicus curiae in civil cases raising a wide variety of constitutional and statu-

tory issues.<sup>1</sup>

This case concerns the power of a state public utility commission to adopt measures intended to educate utility customers about utility policy issues, thereby enhancing informed participation in the regulatory process. The Legal Aid Society has been actively involved in proceedings before the New York State Public Service Commission ("PSC") to ensure that the interests of the poor are adequately considered in ratemaking and other utility decisions. In particular, we successfully advocated that the PSC adopt a measure similar to the California order at issue in

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1

See, e.g., Blum v. Stenson, \_\_\_ U.S. \_\_\_, 104 S.Ct. 1541 (1984); Yaretsky v. Blum, 457 U.S. 991 (1982); Caban v. Mohammed, 441 U.S. 380 (1979) (amicus); Lalli v. Lalli, 439 U.S. 259 (1978) (amicus); United States v. Kras, 409 U.S. 434 (1973).

this case. The Court's resolution of this case may thus materially affect the ability of amicus to vindicate the interests of the poor in utility regulatory proceedings.

Letters from the parties consenting to the filing of this brief are being separately lodged with the Clerk of the Court.

#### SUMMARY OF ARGUMENT

The order of the California Public Utilities Commission ("CPUC") at issue in this case is a carefully considered agency action designed to widen the flow of information to utility ratepayers, expand their participation in regulatory proceedings, promote the accuracy of commission fact-finding, and thereby enhance the calibre of CPUC decision-making, without infringing on the First Amendment rights of regulated

public utilities.

The CPUC has plenary authority to regulate public utilities throughout the state of California. As this Court observed in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 569 (1980), a "[s]tate's concern that [utility] rates be fair and efficient represents a clear and substantial governmental interest." The CPUC found, in the decision below, that "[t]here is no question that participation by representatives of consumer groups tends to enhance" commission decision-making. (A. 19).<sup>2</sup>

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2

"A" refers to Appendix A to the Motion to Dismiss of Appellee, the Public Utilities Commission of the State of California, setting forth a conformed copy of the order at issue in this case, Decision No. 83-12-047 (December 20, 1983), as modified by Decision No. 84-05-039 (May 2, 1984).

Effective participation is, in turn, contingent on broader consumer awareness of regulatory policy issues, and requires the establishment of regular channels of communication between consumers and the groups seeking to represent them in regulatory proceedings.

In order to facilitate fair and efficient utility regulation, the order below requires appellant Pacific Gas & Electric Company ("PG&E") to give Toward Utility Rate Normalization ("TURN"), a California consumer group representing utility customers, access to the "extra space" in the PG&E monthly billing envelope four times each year over a two-year period. By so doing, the CPUC will provide PG&E customers with a vital opportunity to receive information enabling them to become edu-

cated about utility issues, while at the same time expand lines of communication among regulators, public utilities and ratepayers. Under these circumstances, the CPUC could apply its administrative expertise and reasonably conclude that granting TURN's request for access to the extra space in the billing envelope sent to PG&E customers would improve utility regulation in California.

While the billing envelope access order is likely to improve regulatory oversight by increasing informed participation in CPUC proceedings, it does not infringe on PG&E's freedom of speech.

First, unlike the statutes or regulations invalidated in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), Consolidated Edison Co. v. Public Service

Commission, 447 U.S. 530 (1980), and Central Hudson Gas, supra, 447 U.S. at 557, the CPUC order does not curtail PG&E's freedom to speak on any subject at any time. The CPUC order is entirely content-neutral. It does not purport to restrict PG&E's freedom to take any position on any issue. To the contrary, PG&E may utilize the entire contents of the monthly billing envelope to transmit its own material eight out of twelve times each year. Even in the remaining four months, PG&E's right to speak is not significantly abridged. Indeed, PG&E can continue to transmit its message to ratepayers, either under separate cover or even in the monthly billing envelope, provided that it use a larger envelope and absorb the additional mailing costs.

Second, PG&E will not be forced to associate with TURN's message. The CPUC order requires that the TURN material clearly disclaim any review or endorsement by PG&E. Given TURN's position on utility issues, there is little danger that the recipient of the billing envelope will treat TURN's message as if it reflected the views of PG&E.

Finally, the CPUC order may not be seen as attempting to create a public right of access to a private publication. Under California law, the extra space in the billing envelope is the property of the ratepayers, not of PG&E -- a reasonable determination since PG&E's billing costs are entirely paid for by the ratepayers.

The CPUC order, thus, does not compel PG&E to use its privately-owned property to

publish the views of another. Rather, the order simply regulates ratepayer use of ratepayer-owned property in order to enhance the diversity of views presented to PG&E customers, and is consistent with the CPUC's longstanding practice of requiring utilities to carry public service notices in the billing envelope. Far from infringing PG&E's freedom of speech, the CPUC order vindicates the First Amendment interest of PG&E's ratepayers by providing them with more information and enabling them to participate knowledgeably in the regulatory process.

#### ARGUMENT

#### I. THE COMMISSION'S ORDER CONSTITUTES A VALID AND APPROPRIATE EXERCISE OF STATE AUTHORITY TO ENHANCE REGULATORY OVERSIGHT OF PUBLIC UTILITIES

Under California law, the CPUC has

plenary authority to regulate public utilities, including the development of procedures designed to improve the quality of commission decision-making and to facilitate consumer participation in the regulatory process. Cal. Const. art. XII, §§5, 6; Cal. Pub. Util. Code §701. The CPUC order giving TURN periodic access to the extra space in the billing envelope must therefore be seen as part of a regulatory program to enhance the quality of CPUC decision-making.

Both the CPUC and the California Supreme Court have repeatedly affirmed that participation by representatives of consumer groups improves the calibre of CPUC determinations. As the California Supreme Court noted in Consumers Lobby Against Monopolies v. Public Utilities Commission,

25 Cal.3d 891, 908, 603 P.2d 41, 51, 160 Cal.Rptr. 124, 134 (1979), reh. den. (1980), the CPUC "staff is subject to institutional pressures that can create conflicts of interest; and it is circumscribed by significant statutory limitations, such as lack of standing to seek either rehearing or judicial review of Commission decisions [citations omitted]." The CPUC agreed, in the decision below, that "if residential and small business ratepayers are to be fully protected, it is necessary that they be represented in [commission] proceedings." (A.20). It is essential, therefore, that ratepayer organizations, such as TURN, provide utility consumers with critical representation in CPUC regulatory proceedings.

Merely granting organizations like

TURN the right to participate in commission proceedings, however, will do little to increase effective representation of residential and small business customers. Most consumers have little knowledge or understanding of utility policy issues. The poor, in particular, are typically less sophisticated, less educated, and less inclined to acquire the kinds of information necessary to adopt a long-term consumerist perspective. Lack of information forecloses consumers from recognizing, let alone asserting, their interests in the regulatory process. The scant information that they do receive is generally provided by the utilities themselves and, thus, will inevitably be biased in favor of the utilities' positions.

Moreover, even those consumers who

have an informed point of view on regulatory matters are frequently without a regular means by which to express their views to their representatives; they do not know how to reach their representatives; indeed, they may not even know that organizations speaking on their behalf exist. Without consumer education and regular lines of communication between consumer organizations and their constituents, the potential benefits of increased representation are likely to be stunted.

The CPUC "extra space" order should go far to mitigate these problems and to realize the possible benefits of consumer participation in favor of improved CPUC decision-making. By permitting TURN to use the billing envelope four months out of every twelve, the CPUC order will expose

ratepayers to at least a second point of view. Customers who have regularly heard -- and will continue to hear -- PG&E's positions on disputed issues of utility regulation will now also be able to receive additional information and be exposed to the divergent opinions of consumer organizations.

The likely clash of views over such important questions as utility rate structures, profits and investments, the siting of new plants, conservation incentives, and the use of nuclear power can be expected to contribute to the education of utility customers and thus stimulate their participation in the resolution of these public policy issues. Unlike the Public Service Commission order banning utility promotional advertising at issue in

Central Hudson Gas, the CPUC order here increases "the information available for consumer decisions" and thereby vindicates "the purpose of the First Amendment." 447 U.S. at 567. Opening up the billing envelope to consumer organizations in this manner therefore expands the "marketplace of ideas" to include utility policy. Cf. Consolidated Edison, supra, 447 U.S. at 537-38.

At the same time, the CPUC order will enhance the quality of representation that consumers receive from organizations acting in their name. On reading the TURN inserts, many consumers will learn for the first time of the existence of these representatives and how to communicate with them. Consumers will be encouraged to transmit their views to consumer organiza-

tions, thereby increasing the likelihood that consumers' actual beliefs are reflected in the positions taken in their name before the utility regulators. In this way, the extra access order will contribute to the representativeness of the consumer representatives.

By the same token, the billing envelope access order will contribute to the financial ability of consumer organizations to provide effective representation to ratepayers. While the CPUC provides TURN and other organizations with opportunities for compensation for participation in CPUC proceedings, the CPUC found that TURN cannot participate in all proceedings affecting PG&E ratepayers without incurring "significant financial hardship." (A. 19). By giving TURN access to the billing envelope

and thereby permitting TURN to solicit donations from PG&E customers, the CPUC order will help put TURN on a sound financial basis and thus improve TURN'S ability to represent ratepayers effectively in all CPUC proceedings.

Moreover, obtaining substantial donations and statements of support will validate TURN's claims to be representative of substantial numbers of PG&E ratepayers. Conversely, the refusal of customers to contribute money, or their rejection of TURN's positions -- positions of which they would have been unaware and hence unable to reject but for the billing envelope program -- will undercut TURN's claim to be an appropriate consumer representative. In short, giving ratepayers the opportunity to support, or withhold support, from consumer

representatives will contribute greatly to the effectiveness and legitimacy of ratepayer representation before the commission.

Using the extra space in the billing envelope is, moreover, the most appropriate way to secure for the CPUC the benefits of both consumer education and of increased support for consumer representatives. For most ratepayers, particularly the poor, the working class, and those without a college education, the sole point of contact with the regulatory system is the monthly bill that they receive from a utility company. Statements contained in the billing envelope are far more likely to be seen, read and attended to than are alternative modes of communication. Indeed, PG&E implicitly recognizes this fact by trying to retain the billing envelope as its sole preserve --

even though, under California law, the extra space belongs to the ratepayers. Not only is a billing envelope insert the form of communication most likely to be seen and read, but also the insert constitutes the most cost-effective mechanism to reach, on a regular basis, large numbers of consumers scattered throughout as large a state as California.

The terms of the CPUC order are closely geared to enhancing the public utility regulatory process. Funds that TURN receives from the bill insert process are to be "used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E." (A. 23). TURN will be required "to establish an adequate mechanism to account for the receipt and disbursement of [all] funds" so received. (A.

23). Finally, TURN will be obligated to prepare and distribute an annual report to all PG&E contributors describing TURN's activities on their behalf before the Commission. (A.23).

In issuing its order, the CPUC thus properly determined that giving TURN periodic access to the billing envelope "will help assure the fullest possible participation in [commission] proceedings" by enhancing the record in CPUC proceedings and complementing the efforts of Commission staff. (A. 19-20). As this Court held in Central Hudson Gas, a "[s]tate's concern that rates be fair and efficient represents a clear and substantial governmental interest." 447 U.S. at 569. Enhanced regulatory oversight will undoubtedly contribute to the issuance of fair and efficient

rates and to the adoption of improved regulatory policy generally. Under these circumstances, the CPUC order must be seen as constituting an appropriate exercise of agency expertise to expand ratepayer participation in agency decision-making and to improve the calibre of agency determinations.

## II. THE COMMISSION'S ORDER DOES NOT INFRINGE ON PACIFIC GAS & ELECTRIC'S FIRST AMENDMENT RIGHTS

Pacific Gas & Electric contends that the CPUC's billing envelope access order violates the utility's freedom of speech. Despite the variety of arguments that PG&E marshalls in support of this contention, it is apparent that the order does not infringe on the utility's rights; rather, it vindicates the First Amendment interest of the utility's ratepayers.

PG&E relies heavily on this Court's decision invalidating orders promulgated by the New York State Public Service Commission ("PSC") concerning billing envelopes in Consolidated Edison, supra, 447 U.S. at 530, and Central Hudson Gas, supra, 447 U.S. at 557, but those orders are strikingly different from the order in question in this case. Those PSC orders sought to prohibit the utilities from using billing envelopes to communicate with ratepayers on certain subjects. They were, thus, constitutionally suspect as content-regulation and as absolute restrictions on speech.

In the present case, by contrast, the CPUC order is utterly content-neutral. There is no attempt to limit PG&E's ability to communicate with its customers either on

particular issues or in general. The CPUC decision below states that no controls are placed "on the content" of Progress, PG&E's billing insert, (A.11), and the order mandates that both PG&E and TURN "shall each determine the content of its own material." (A. 38). There is no attempt here to prohibit PG&E from speaking on any subject.

Nor does the CPUC order significantly curtail the quantity of PG&E's communication with its ratepayers. For eight out of twelve months each year, PG&E has complete control over the extra space in the billing envelopes; it may include Progress or presumably any other message. During the remaining four months of the year, when PG&E must share the envelope with TURN, the utility still remains free

to communicate with its customers: It can mail Progress to its customers under separate cover, or it could even include Progress in the billing envelope, provided it is willing to use a larger envelope and pay the additional costs. PG&E's freedom to speak is unimpaired.

PG&E also contends that by requiring it to place TURN materials in the billing envelope, the CPUC would force it to associate with the message of another, in violation of the principle elaborated in Wooley v. Maynard, 430 U.S. 705 (1977). In Wooley, New Hampshire sought to compel motorists to display the motto "Live Free or Die" on passenger vehicle license plates. The Court determined that the gravamen of unconstitutionality was "a state measure which forces an individual, as part of his

daily life -- indeed constantly while his automobile is in public view -- to be an instrument for fostering public adherence to an ideological point of view which he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment...to reserve from all official control.'" 430 U.S. at 715 (citations omitted). The distinctions between the CPUC order and the New Hampshire license plate are manifold and manifest.

First, the CPUC'S order can hardly be likened to the kind of affront to personal autonomy, to the "daily life" of the individual, as that presented in Wooley. The PG&E envelope is a mechanism for the transmittal of monthly bills and utility-related messages, not the "sphere of the

spirit." Second, while the information transmitted is of course related to utility issues, "no specific message is dictated by the State." To the contrary, the CPUC has authorized TURN to prepare its own material and requires TURN to disclaim any review or endorsement by the commission. This mitigates any possible "danger of governmental discrimination for or against a particular message." This Court in the Pruneyard Shopping Center v. Robins, 447 U.S. 74, 88, 87 (1980), decision found this factor critical in distinguishing Wooley, while affirming the California Supreme Court's decision allowing individuals to come on to a shopping center and distribute pamphlets expressing views not shared by the shopping center owner.

Finally, in Pruneyard, this Court

further distinguished Wooley by finding that the shopping center owner could dispel the Wooley "speech by association" problem by "expressly disavow[ing] any connection with the message by simply posting signs in the area where the speakers or handbillers stand." Id. at 87. Here, the CPUC has dealt with the question of disclaimer in a manner even more favorable to PG&E, by putting the burden on TURN to have its material clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E. If the shopping center owner's opportunity to disclaim message-by-association in Pruneyard was sufficient to distinguish Wooley, then surely TURN's obligation to issue the necessary disclaimer should eliminate any Wooley objection here.

Appellant's remaining argument attempts to tie together elements of the decisions in Wooley, supra, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), and Abood v. Detroit Board of Education, 431 U.S. 209 (1977), in support of an absolute denial of the right of any individual to obtain access to the property of any other in order to broadcast a message. Whatever the merit of the asserted doctrine in the abstract -- and it seems inconsistent with the decisions of this Court is Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969) and Pruneyard, supra, 447 U.S. at 74 -- in order for it to be of any assistance to PG&E, appellant must demonstrate that its privately-owned property is being used to broadcast TURN's message.

It is here that appellant's argument fails. The forum for TURN's communications is the extra space in the utility monthly billing envelope. The CPUC has determined as a matter of California public utility law that the extra space in the billing envelope is the property of the ratepayers, not the utility. (A.33). The California Supreme Court has affirmed that decision on appeal.

These California determinations are dispositive of PG&E's arguments. It is firmly established that property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law," Board of Regents v. Roth, 408 U.S. 564, 577 (1971).

It is the state of California which is "possessed of residual authority that enables it to define property in the first instance." Pruneyard, supra, 447 U.S. at 84. The state of California has examined the relative property interests of the utility and the ratepayers in the extra space in the billing envelope, and has defined the extra space in the billing envelope as the property of the ratepayers.

California's determination is a reasonable one. First, the extra space is the product of activity essential to utility regulation. (A.7). The ratepayers pay for the postage and other mailing costs incurred when PG&E sends out its monthly bill. Since postage costs are assessed in units of one ounce, and since the bill itself weighs less than one ounce, extra

space remains in the billing envelope. Since the extra space was paid for by the ratepayers, it is quite reasonable to say that it belongs to them.

Second, the CPUC's determination is consistent with the commission's long-established practice of requiring utilities to carry various public service announcements in the extra space of the billing envelope. As the commission explained below, "[u]se of the billing space to accomplish various informative functions for the benefit of ratepayers now occurs so frequently that it had become a routine matter." (A.7). The CPUC has directed California utilities to insert notices of applications for rate changes, notices of public hearings, notices of the availability of various energy conservation

programs, information concerning federal tax law changes, and an announcement of a new "lifeline" program designed to assist low-income people to remain on the telephone system in the wake of the divestiture of AT&T. (A.7). There is no evidence in the record that PG&E or any other California utility ever objected to carrying these messages in the extra space of the billing envelope. Yet under PG&E's theory, if the extra space is utility property, then all of these inserts would have been constitutionally suspect. Indeed, given the distinction drawn in Pruneyard between government-written messages and private-party messages, 447 U.S. at 87, these inserts would have been far more problematic than the TURN inserts at stake in the present case.

The primacy of the states in defining property interests, coupled with the reasonableness of the CPUC determination in light of both past, unchallenged practice and the source of the funds which create the extra space, establishes that the extra space is the property of the ratepayers and that PG&E can have no claim that its privately-owned property is being used to publish the message of another.

None of the cases PG&E relies on can bolster its argument. Wooley has already been shown to be inapposite. Tornillo, which struck down a Florida statute requiring a newspaper to publish a candidate's reply to criticism previously published by the newspaper, "rests on the principle that the State cannot tell a newspaper what it must print," Pruneyard,

447 U.S. at 88. The Florida statute "'exact[ed] a penalty on the basis of the content of a newspaper,' [and thus threatened to] 'dampe[n] the vigor and limi[t] the variety of public debate' by deterring editors from publishing controversial political statements....Thus, the statute was found to be an 'intrusion into the function of editors.'" Id., quoting Tornillo, 418 U.S. at 256, 257, 258.

The CPUC order, however, is not content-based, will have no impact on the editorial process, and will not deter controversial political statements. Indeed, by providing information on a range of disputed regulatory policy issues, TURN's inserts are more likely to provoke controversy than to prevent it. As in Pruneyard, the concerns underlying Tornillo

"obviously are not present here," 447 U.S. at 88.

Similarly, Abood provides no support for appellant's case. Abood invalidated a state law permitting public agencies to require employers to contribute to union political activities. Again, however, the gravamen of unconstitutionality in Abood is the contribution of one's own funds or property to propagate the message of another. Here, the property in question is the ratepayers', not the utility's.

Indeed, in a sense, Abood tends to buttress the CPUC's order. Ratepayer-funds were formerly used to finance the dissemination of PG&E messages only. Ratepayers who disagreed with the utility on questions of nuclear power, conservation, rate structures or other matters found themselves in

the position of financing communications to which they were opposed. It is the ratepayers, not PG&E, who more closely resemble the non-union employees in Abood.<sup>3</sup> The CPUC order will eliminate this one-sided use of ratepayer funds, and diversify the views presented. The CPUC order, without infringing on PG&E's freedom of speech, will thus vindicate the First Amendment interests of PG&E's ratepayers.

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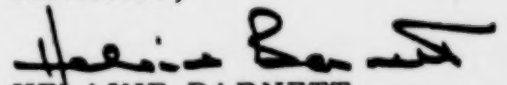
In Consolidated Edison, supra, this Court noted but did not decide whether Abood precluded a utility from passing on to ratepayers the costs of bill inserts that discuss controversial issues of public policy. 447 U.S. at 543-44, n. 13.

## CONCLUSION

For the reasons stated, the decision of the Supreme Court of California should be affirmed.

Respectfully submitted,

KALMAN FINKEL  
Attorney-in-Charge  
The Legal Aid Society  
of New York City  
Civil Division  
11 Park Place  
New York, N.Y. 10007  
(212) 227-2755

  
HELAINE BARNETT  
Assistant Attorney-in-Charge  
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[Counsel of Record]

RICHARD BRIFFAULT  
Associate Professor  
of Law  
Columbia University  
School of Law  
435 West 116 Street  
New York, N.Y. 10027  
(212) 280-2638

JOHN E. KIRKLIN  
Director of Litigation  
HELEN HERSHKOFF,  
of Counsel  
The Legal Aid Society  
Civil Appeals & Law  
Reform Unit  
11 Park Place  
New York, N.Y. 10007  
(212) 406-0745

Counsel for Amicus Curiae  
The Legal Aid Society of New York City

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